

**THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.1878 & 1879/MUM/2020
(Assessment Years: 2010-11 & 2011-12)**

Nyka Steels Pvt. Ltd.
13-14 Peeru Lane,
Bhindi Bazar,
Mumbai – 400 010

DCIT, Panvel Circle
Vs. Room No. 304, 3rd Floor,
Trifred Tower, 11th Floor,
Opp Khanda Colony,
New Panvel,
Panvel 410 206

PAN No. AAACN1660Q

(Assessee)

(Revenue)

Assessee by
Revenue by

: Shri Santosh Pathak, A.R
: Shri Tharian Oommen, D.R

Date of Hearing : 22/09/2021
Date of pronouncement : 01/10/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-2, Pune, dated 07.11.2017 and 07.09.2020 for A.Y. 2010-11 and A.Y. 2011-12, respectively, which in turn arises from the respective orders passed by the A.O u/s 271(1)(c) of the Income Tax Act, 1961 (for short 'Act'), dated 23.03.2019. As a common issue is involved in the aforementioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal filed by the assessee for A.Y 2010-11. The assessee has assailed the impugned order on the following grounds before us:

- “1. The appellant neither furnished inaccurate particular of Income nor conceal the facts. The penalty is wrong and t should be deleted.
2. The CIT(A) has added the G.P @ 15% of Purchases. Merely on the basis of MVAT information the purchases added which were wrong.
3. The appellant had shown the Consumption of RM/CS in RG-21 records to CIT(A) at the time of appeal.
4. The appellant crave leave to add or delete the GA at the time of hearing.
5. Whether there is any delay in filing of appeal.”

2. Briefly stated, the assessee company which is engaged in the business of manufacturing of round/rectangular pipes from steel coils/sheets which are further used for manufacturing of scaffolding and props by adding accessories like angles, ledgers, jack nuts, etc, had filed its return of income for A.Y 2010-11 on 29.09.2010, declaring an income of Rs.2,94,86,258/-. The return of income filed by the assessee company was processed as such u/s 143(1) of the Act. Subsequently, on the basis of information received by the A.O from the Sales Tax Department that the assessee as a beneficiary had dring the year under consideration obtained bogus purchase bills aggregating to Rs.7,68,838/- from 6 tainted parties, its case was reopened u/s 147 of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that the assessee had claimed to have made purchases of Rs.7,69,838/- from the following 6 tainted parties:

Sr. No.	Name of the party	Amount of bill
1.	Asian Tube Trading	Rs.1,04,000/-
2.	Gulab Trading Co.	Rs.12,911/-
3.	Naman Enterprises	Rs.449/-
4.	Rupani & Co.	Rs.5,81,019/-
5.	Shiv Industries	Rs.36,447/-
6.	Vijay Steels	Rs.35,012/-
	Total	Rs.7,69,838/-

As the assessee failed to substantiate the authenticity of the aforesaid purchases transactions on the basis of supporting documentary evidence to the satisfaction of the A.O, therefore, the latter added the entire value of the impugned

purchases and vide his order passed u/s 143(3) r.w.s 147, dated 20.03.2015, determined the total income of the assessee company at Rs.3,10,29,780/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Observing, that though the assessee had filed certain documentary evidence in support of its claim of having made genuine purchases from the aforementioned parties, it was observed by the CIT(A) that the authenticity of the impugned purchases could not be proved to the hilt to the satisfaction of the A.O. It was observed by the CIT(A) that the assessee had duly maintained the stock details of the goods procured and consumption thereof. Backed by the aforesaid facts, the CIT(A) was of the view that as the assessee had procured the goods in question though not from the aforementioned hawala parties but from some other parties, therefore, the entire value of the impugned purchases could not have been added to the returned income of the assessee. Accordingly, the CIT(A) in all fairness restricted the addition to 15% of the value of the impugned purchases of Rs.7,69,838/- and scaled down the addition to an amount of Rs.1,15,476/-.

5. After receiving the order of the CIT(A) in the quantum appeal, the A.O called upon the assessee to explain that as to why penalty u/s 271(1)(c) with respect to the addition qua the impugned purchases as was sustained by the CIT(A) may not be imposed on it. As the reply filed by the assessee did not find favor with the A.O, therefore, he vide his order passed u/s 271(1)(c), dated 23.03.2019 imposed a penalty of Rs. 29,250/-.

6. Aggrieved, the assessee assailed the penalty imposed by the A.O u/s 271(1)(c) before the CIT(A). However, the CIT(A) not finding favor with the contentions advanced by the assessee upheld the penalty imposed by the A.O.

7. The assessee being aggrieved with the order passed by the CIT(A) has carried the matter in appeal before us. It was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee that as the addition with respect

to the impugned purchases had been sustained by the CIT(A) i.e @ 15% of the value of the impugned purchases was merely on the basis of an estimate, therefore, no penalty u/s 271(1)(c) was called for in the hands of the assessee. It was, thus, submitted by the Id. A.R that the penalty sustained by the CIT(A) could not be sustained and was liable to be vacated.

8. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities.

9. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, it is a matter of fact borne from the record that the assessee had failed to substantiate the genuineness and veracity of the impugned purchases to the satisfaction of the A.O. At the same time, we cannot remain oblivious of the fact that certain documentary evidence were furnished by the assessee in order to drive home his claim that genuine purchases were made from the aforementioned parties. On a perusal of the order passed by the CIT(A) in the quantum appeal, we find that it was categorically observed by him that the assessee had duly substantiated the fact of having purchased the goods in question a/w the consumption thereof on the basis of quantitative details that were produced before him. Be that as it may, we find that it is a matter of fact borne from the record that the impugned addition had been sustained by the CIT(A) i.e @ 15% of the value of the purchases in question merely on the basis of an estimate and not on the basis of any concrete documentary evidence which would irrefutably prove that the assessee had inflated his purchases on the basis of bogus bills obtained from the aforementioned parties. Backed by the aforesaid facts, we are of the considered view that now when the addition made in the hands of the assessee in itself is based on an estimate basis, therefore, no penalty u/s 271(1)(c) qua such addition could have been validly imposed. Our aforesaid conviction is fortified by the judgment of the Hon'ble High court of

Bombay in the case of CIT vs. Upendra B. Mithani (L No. 1860 of 2009, dated 05.08.2009). In the aforesaid order, the Hon'ble High Court had concurred with the view taken by the Tribunal, that, if the assessee gives an explanation which is unproved but not disproved i.e it is not accepted but circumstance do not lead to the reasonable and positive inference that the assessee's case is false, then, penalty u/s 271(1)(c) cannot be imposed. The Hon'ble High Court while upholding the order of the Tribunal had observed as under :

“The Commissioner of Income Tax (A) has rightly taken a view that no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does. If the assessee gives an explanation which is unproved but not disproved, i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false. The view taken by the Tribunal is a reasonable and possible view.”

Accordingly, in the backdrop of our aforesaid deliberations, we are of the considered view that no penalty u/s 271(1)(c) qua the addition made by the A.O with respect to the unproved purchases could have validly been imposed. We, thus, in terms of our aforesaid observations vacate the penalty of Rs.39,250/- imposed by the A.O u/s 271(1)(c) of the Act.

10. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

ITA No. 1879/Mum/2020
A.Y. 2011-12

11. We shall now take up the appeal filed by the assessee assessee for A.Y. 2011-12.

12. Briefly stated, the assessee company had filed its return of income for A.Y. 2011-12 on 29.09.2011, declaring a total income of Rs.3,86,64,987/-. Return of income filed by the assessee company was initially processed as such u/s 143(1) of the Act. Subsequently, on the basis of information received by the A.O that the

assessee as a beneficiary had obtained bogus purchase bills from certain hawala dealers, its case was reopened u/s 147 of the Act.

13. Observing, that the assessee had failed to substantiate the genuineness and veracity of the impugned purchases of Rs.1,96,54,571/- that was claimed to have been made from 9 tainted parties, the A.O added the entire value of the impugned purchases to the returned income of the assessee.

14. Assessment was thereafter framed by the A.O vide his order passed u/s 143(3) r.w.s 147, dated 20.03.2015, wherein the income of the assessee company was determined at Rs.5,83,19,560/-.

15. On appeal, the CIT(A) being of the view that the assessee had procured the goods in question though not from the aforementioned parties but from the open/grey market, thus, sustained the addition on an estimate basis at 15% of the value of the impugned purchases.

16. After the order was passed by the CIT(A) disposing off the quantum appeal of the assessee, the A.O vide his order passed u/s 271(1)(c), dated 23.03.2019 imposed a penalty of Rs.9,79,320/- on the assessee company.

17. Aggrieved, the assessee assailed the penalty imposed by the A.O u/s 271(1)(c) of the Act before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the penalty imposed by the A.O.

18. The assessee being aggrieved with the order passed by the CIT(A) upholding the penalty imposed by the A.O u/s 271(1)(c) of the Act has carried the matter in appeal before us. As the facts and the issue involved in the present appeal remains the same as were there before us in the assessee's appeal for the immediately preceding year i.e A.Y. 2010-11 in ITA No. 1878/Mum/2020,

therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposal of the present appeal. Accordingly, the present appeal filed by the assessee is allowed in terms of our observations recorded while disposing off its appeal for the preceding year i.e A.Y. 2010-11 in ITA No. 1878/Mum/2020.

19. Resultantly, both the appeals of the assessee are allowed in terms of our observations recorded hereinabove.

Order pronounced in the open court on 01.10.2021

Sd/-

(Pramod Kumar)
VICE PRESIDENT

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 01.10.2021

*PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai